81-2230
No.

SUPREME COURT, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

LINDA L. McGOUGH, *Petitioner,*

v.

THE STATE OF FLORIDA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Was not the petitioner denied due process of law and the right to a fair and impartial trial within the meaning of the due process clause of the 14th Amendment of the Constitution of the United States when the State's Attorney improperly argued to the jury on two occasions that he personally knew that the witnesses who testified against the Petitioner were telling the truth?

II. Was not the Petitioner denied due process of law and equal protection of the laws, and denied benefits conferred on a certain class of defendants in the State of Florida by the Supreme Court of Florida in *Tascano v. State,* 393 So.2d 540 (1980), which mandated that trial judges instruct the juries on the maximum and minimum sentences for the crimes on which the accused stood trial?

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IN THE

Supreme Court of the United States

1981 TERM

No.

LINDA L. McGOUGH, *Petitioner,*

v.

THE STATE OF FLORIDA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner herein prays for a writ of certiorari to review the judgment of the Supreme Court of Florida. This judgment denied review from the affirmance of the Petitioner's conviction by the District Court of Appeals, Fifth District, for the State of Florida. The final order denying review was entered on April 5, 1982, and is attached (Pet. App. 1a).

CITATION TO OPINIONS BELOW

The Supreme Court of Florida in its final order and judgment denied review without an opinion. The District Court of Appeals, Fifth District, State of Florida, entered an opinion affirming the conviction of the Petitioner for second degree murder. This opinion is attached (Pet. App. 6a).

JURISDICTION

The final judgment from the Supreme Court of Florida was entered on April 5, 1982. Jurisdiction is predicated on Title 28, U.S.C., Section 1257(3).

STATEMENT OF THE CASE

The Petitioner was charged with first degree murder. Petitioner was convicted of second degree murder. During the trial, the State's Attorney in his closing to the jury, made wholly improper arguments telling the jury, in two instances, that the main government witnesses who testified against the Petitioner were known by him to be telling the truth because, from interviews with him they knew that they would be prosecuted for perjury if they testified falsely (Tr. 10, Pet. App. 3a). The State's Attorney referred again in closing argument to the testimony of a second witness and specifically advised the jury that he knew she was telling the truth because she had come into his office where he confronted her with a statement he had elicited from another witness which he believed to be true and advised her that she would be prosecuted for perjury if she did not testify truthfully. Petitioner's counsel noted his objection and moved for a mistrial. Mistrial was denied; the trial judge contented himself with instructing the jury in the general charge to the jury that statements of counsel were not to be construed as evidence. Even though raised in the appellate process of the State of Florida, this constitutional issue was not discussed in either the opinion of the District Court of Appeals of the State of Florida or by the Supreme Court of Florida.

During the course of the trial, the Petitioner's counsel requested the Court to instruct the jury on the penalty

sentences which may be imposed for the offense for which the Appellant was on trial (first degree murder), and the lesser included offenses (second degree murder and manslaughter) (Tr. 3 & 4, Pet. App. 2a).

The trial of the Petitioner was on May 16, 1980, and on June 5, 1980 the Supreme Court of Florida entered a decision in the case of *Tascano v. The State of Florida,* 393 So.2d 540, (Fla. 1980) mandating under Fla.R.Crim.P. 3.390(a) that it would be mandatory upon request of either an accused or the State, to instruct the jury on the maximum and minimum sentences that may be imposed. The Supreme Court of Florida ruled that its opinion would not be retroactive, but would operate prospectively and would also apply to all defendants who had preserved this point on appeal, and whose appeals had not yet been decided. This District Court of Appeals for the Fifth District of the State of Florida, and the State of Florida in its opinion, ruled that the Tascano case did not apply to the Petitioner.

STATUTES AND RULES INVOLVED

Section 1: 14th Amendment to the Constitution

> * * * nor shall any state deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

The Petitioner was denied due process of law and the right to a fair and impartial trial when the prosecutor improperly argued to the jury that he knew from personal interviews with his witnesses that they were telling the truth, which was verified by his established policy of advising the

witnesses they would be prosecuted for perjury if they did not testify truthfully. In *Berger v. United States*, 295 U.S. 668, 55 S.Ct. 629 the Court stated:

> It is more or less fair to say that the average jury in a greater or lesser degree has confidence that these obligations so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry very much weight against the accused when they should properly carry none.

Against the important expression of this Court safeguarding the right of the accused to a fair trial and placing reasonable limitations upon the prosecutor, the Petitioner in this case suffered two very serious breaches of this principle during the closing argument of the prosecuting attorney. In referring to one of the state's witnesses who had testified against the Petitioner the prosecutor stated (Tr. 10, Pet. App. 3a):

> But he came down to my office and I advised him of perjury. I advised all witnesses. I advised them that, if they do not tell the truth and I can prove that they do not tell the truth, I will prosecute them for perjury, whether they did it in my office under oath or on the stand. If I ever catch a witness, I will prosecute them for perjury if I can prove it.

Not satisfied with this expression of personal opinion, the State's Attorney then proceeded to state (Tr. 11-12, Pet. App. 4a):

> I called Judy Willits next, and Miss Willits testified that she was at that time a topless

> dancer, and she saw no fight, or excuse me, she saw the start of the fight, but she never saw the victim, Philip Gauthier, with a knife in his hand. She told the police that. She told Mr. Kirkland that under oath. She came into my office for about an hour and told me that. I advised her of perjury. I advised her that, if she did not tell the truth, because I had David Gauthier's statement at that time, which I believed to be the truth, that I would prosecute her for perjury.

Thus, the prosecuting attorney in this case improperly laid before the jury that his independent investigation and his policy of advising his witnesses that they would be prosecuted for perjury, established that their testimony at trial against the Petitioner was, in fact, true.

Not only did the argument of the prosecuting attorney constitute a direct violation of this Court's pronouncement in *Berger v. United States,* supra, but the trial court did not perform the concomitant duty placed upon it of taking firm corrective action when the State's Attorney leant his personal credibility to the testimony of the witnesses who had testified against the Petitioner.

Indeed, this Court recently, in referring to *Berger v. United States,* supra, in a different context, made it clear that the trial judge has an important function of seeing to it that the accused receives a fair trial. *Gannet Company, Inc. v. DePasquale,* 443 U.S. 387, 99 S.Ct. 2898 (1979) in this Court stated:

> • • • The responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. A fortiori the trial judge has the same dual obligation.

The record in this case shows improper action of the State's Attorney was extremely prejudicial and deprived the Petitioner of a fair and impartial trial. The record is equally clear that the trial judge did not satisfy his burden of taking corrective action in that regard. This serious error of constitutional dimensions was not even discussed or noticed by either the District Court of Appeals, Fifth District, in its opinion, or in the order of the Supreme Court of Florida denying review. It is clear that the instant decision is contrary to a line of decisions of the Supreme Court of Florida and various circuit courts of appeal, including those of the Fifth Circuit, which have followed this Court's pronouncement in *Berger v. U.S.*, supra; *Thompson v. State*, 318 So. 2d 549; *Wilson v. State*, 294 So.2d 327; *Goddard v. State*, 143 Fla. 28, 196 So. 596; *Blanco v. State*, 150 Fla. 98, 7 So.2d 333; *McMillan v. U.S.*, 363 F.2d 165 (5 Cir. 1966); *Henderson v. U.S.*, 218 F.2d 14 (6 Cir. 1955); *U.S. v. Dawson*, 486 F.2d 1236 (5 Cir. 1973); *U.S. v. Brown*, 451 F.2d 1231 (5 Cir. 1971).

The uitimate effect of the prosecutor's arguments in this case were to leave no doubt in the minds of the jury that his investigations established that he had knowledge that had not be received in evidence that would corroborate the witnesses' story. in fact, the prosecutor advised the jury that he had taken personal steps to verify the witnesses' statements, that he had done so, and that therefore there were matters outside the record which assured him that his witnesses had told the truth.

The Petitioner was denied due process of law, the right to a fair and impartial trial, and this Court should accordingly grant the Writ of Certiorari.

II

The refusal of the Florida Appellate Courts to accord the Petitioner the benefits of its ruling in *Tascano v. State*, 393 So.2d, 540 (Fla. 1980) deprived the Petitioner of due process of law and the equal protection of the laws.

In *Tascano v. State*, 393 So.2d 540, the Supreme Court of Florida ruled that all accused in Florida henceforth were mandatorily entitled to an instruction on the maximum and minimum offenses for which they were charged. This ruling involved the construction of Florida Rules of Criminal Procedure, 3.390(a). This rule reads:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of the argument of counsel and upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offenses for which the accused is then on trial.

The Florida Supreme Court gave the benefit of its ruling also to all defendants whose appeals had not yet been decided, and who had preserved the point on appeal. Petitioner's counsel had specifically requested the trial judge instruct the jury on the maximum and minimum sentences not only for the charge on which the Petitioner was on trial (first degree murder) but the lesser included offenses which were included within that charge, namely murder in the second degree and manslaughter. Petitioner was a member of the class of defendants who acquired the rights conferred by *Tascano v. State*, supra. The District Court of Appeals for the Fifth District in its opinion ruled that the Petitioner was not entitled to the benefits of the Tascano opinion. The District Court of Appeals stated:

> Although our Supreme Court has said a Tascano violation is reversible error, we do not believe Tascano applies here. There is no requirement in the law that the trial judge instruct the jury as to the penalty of a lesser included offense.

We submit to the Court that this decision is arbitrary, capricious and irrational in that when the Petitioner is on trial for first degree murder *he simultaneously is on trial for the lesser included offenses of second degree murder and manslaughter if there is any evidence to warrant submission of those charges to the jury.* Guaranty of due process demands that the law shall not be unreasonably arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be obtained, *Paramount Pictures v. Langer,* D.C.ND 1938. 23 F.Supp. 890, motion granted 59 S.Ct. 641, 306 U.S. 890.

Certainly the Petitioner in this case is being denied the equal protection of the laws specifically conferred upon all accused persons in the state of Florida pursuant to the state decision in *Tascano v. State,* 393 So.2d 540 (Fla. 1980), since his appeal was still pending and he had pursued the point dealing with instructing the jury on the maximum and minimum sentences involved.

While construction of a state criminal rule by the state courts would not ordinarily raise a constitutional issue for the Court's consideration, the construction of the Florida Criminal Rule by the Florida court created a class of defendants entitled to its benefits and the Court's action in denying the Petitioner who was a protected member of the class the rights under *Tascano v. State* has denied him the equal protection of the laws.

In light of the above, we ask this Court to grant the Petition for Writ of Certiorari and to reverse the judgment of the court below.

CONCLUSION

For the reasons state herein, a writ of certiorari should issue to review the judgment of the Supreme Court of Florida.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

Monday, April 5, 1982

LINDA L. McGOUGH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 61, 535

District Court of Appeal,

5th District - No. 80-561

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

by: /s/ Tanya Carroll
Deputy Clerk

TC

cc: Hon. Frank J. Habershaw, Clerk
Hon. Richard B. Keating, Judge
Hon. W. D. Gorman, Clerk
Warren H. Edwards, Esquire
Mark C. Menser, Esquire

[3] * * * requested by the jury.

MR. BAND: Judge, I have no desire to see them go back. It makes no difference.

THE COURT: Under the law, they are required to be reduced to writing, which they are or will be, but it's discretionary with the court as to whether they accompany the jury back to the jury room, and I think we will not send them back.

MR. KIRKLAND: There was one request, if Your Honor please, that was made for the record and was denied. We would request the Court, in view of the nature of this charge, that the Court read to the jury the punishment as it relates to each of the offenses included as lesser included offenses of the indictment.

MR. BAND: The State would oppose that motion, Your Honor.

THE COURT: I will not do that.

MR. KIRKLAND: All right.

THE COURT: I think we are agreed on the lesser included offenses, but, for the record, let me, gentlemen, review that.

The charge, of course, contained in the indictment is murder in the first degree and we are agreed, I believe, that the lesser included offenses would be murder in the second degree, manslaughter, aggravated [4] assault, assault, and battery.

MR. KIRKLAND: Yes, sir.

MR. BAND: That's correct, Your Honor.

THE COURT: Any other matter?

MR. KIRKLAND: Did you rule on my motion for a judgment of acquittal? I know you previously ruled, but I didn't know.

THE COURT: I'll deny the motion.

MR. KIRKLAND: All right.

THE COURT: Any other matter that we need to—

MR. BAND: I don't believe so, Your Honor.

THE COURT: All right. The verdict form is as we have reviewed it, as being typed up, and you will get an opportunity to see or to have an opportunity to before we finish.

Do you have any idea how long you will need, Mr. Band?

MR. BAND: No, Your Honor. I don't anticipate being all that verbose.

MR. KIRKLAND: No souls are saved after the first twenty minutes, Your Honor.

THE COURT: We will remember that pledge, Mr. Band.

Would you bring the jury in, please.

(Whereupon, the jury entered the courtroom at 2:59 o'clock P.M., after which the following proceedings occurred:) • • •

• • •

[10] Number two, he was living in the victim's, excuse me, living in the defendant's house. Now, what is the most important thing for someone, for an individual like Mr. McCraney? He is a street person. He needs a place to sleep. He needs the security of a home. That's the only thing he has because he has no money. He lives from meal to meal, but he needs a place to go, and Mrs. McGough supplied him with that place to go and he was willing to protect himself by lying to the police.

But he came down to my office and I advised him of perjury. I advise all witnesses. I advised them that, if they do not tell the truth and I can prove they do not tell the truth, I will prosecute them for perjury, whether they did it in my office under oath or on the stand. If I ever catch a witness, I will prosecute them for perjury if I can prove it.

And Mr. McCraney said he fabricated a story, but that he came into court and he told the truth. There was never ever any knife, that he then took an automobile, the keys were given to him by the defendant, and some money.

The defendant admitted she loaned him some money so he and Miss Willits, and a girl he was dating at the time, can make their escape or at least leave the Orlando area, and that he did.

We found him in Pennsylvania, flew him back, and [11] brought him back for the hearing and for this trial.

Think about Mr. McCraney on the stand. Mr. Kirkland confused him and, to some degree, may have impeached him, but the basic story he told was the first story he told Officer Aiello that night, and I submit to you that it's the truth.

After calling Officer Aiello, Officer Aiello also testified as to the condition of David McGough that night, that there was no scratch on his chest, that he looked at him very closely because he heard about the knife, and he took into evidence that shirt of the defendant, the shirt which will have some, as we discussed before, but you will be able to see, you can take this back yourselves. You can see the cuts on that shirt. This is what he took into evidence.

I called Judy Willits next and Miss Willits testified she was at that time a topless dancer, and she saw no fight, or, excuse me, she saw the start of the fight, but she never saw the victim, Philip Gauthier, with a knife in his hand. She told the police that. She told Mr. Kirkland that under oath. She came into my office and, for about an hour, told me that. I advised her of perjury. I advised her that, if she did not tell the truth, because I had David Gauthier's statement at that time, which I believed to be the truth, but I would [12] prosecute her for perjury.

MR. KIRKLAND: Your Honor, I object to both of those comments and I don't believe I have ever done this before, but he is commenting now about some statement that's not even in evidence. That's highly prejudicial in closing argument.

THE COURT: Sustain the objection.

MR. BAND: Okay.

THE COURT: Would you approach the bench, please?

(Whereupon, a side bar conference was had between the counsel and the Court outside the hearing of the jury and on the record as follows:)

THE COURT: What you have been doing is just testifying to the jury.

MR. BAND: Excuse me.

MR. KIRKLAND: I'm going to move for a mistrial after it's over and on two statements already.

THE COURT: You have been testifying about what you did.

MR. BAND: Well, the, I took his, I took the statements and the jury is aware I took statements.

THE COURT: I understand, but you are testifying about what you did. You are testifying about what your practice is, about prosecuting for perjury.

MR. KIRKLAND: I was going to move for a mistrial.

* * *

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 1981

LINDA L. McGOUCH,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

CASE No. 80-561

_____ /

Opinion filed November 11, 1981

Appeal from the Circuit Court
for Orange County,
Richard B. Keating, Judge.

Edward R. Kirkland, P.A.,
Orlando, for Appellant.

Jim Smith, Attorney General,
Tallahassee, and Mark C. Menser,
Assistant Attorney General,
Daytona Beach, for Appellee.

DAUKSCH, CJ.,

This is an appeal from a conviction of murder in the second degree.

The appellant was charged with murder in the first degree and went to trial on that charge. At trial she requested an instruction be given the jury relating to the penalty she could receive if convicted. Thr trial judge refused to give the penalty instruction. *Tascano v. State*, 393 So.2d 540 (Fla. 1930), *rehearing denied*, Feb. 27,

1981, requires the giving of such an instruction in compliance with Florida Rule of Criminal Procedure 3.390(a):

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) *for the offense* for *which the accused is then on trial.* (emphasis added).

Although our Supreme Court has said a *Tascano* violation is reversible error we do not believe *Tascano* applies here. There is no requirement in the law that a trial judge instruct the jury as to the penalty for a lesser included offense.

The failure to give an instruction regarding the penalty for a crime of which the accused was not convicted must be harmless error. *See James v. State*, 393 So.2d 1138 (Fla. 3d DCA 1981).

AFFIRMED.

COBB and UPCHURCH, F., JJ., concur.

CASE NO. 88-2288

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LINDA L. ROBERTS, Petitioner,

v.

THE TOWN OF HUDSON, Respondent.

QUESTIONS PRESENTED

1. Was the Petitioner denied either due process of law or a fair trial within the meaning of the due process clause of the 14th Amendment of the Constitution of the United States when the assistant state attorney merely argued to the jury facts testified to by witnesses at trial?

2. Was the Petitioner denied either due process of law or equal protection of the law simply because her case falls within a recognized exception to the decision of the Supreme Court of Florida in Tascano v. State, 393 So.2d 540 (1980) which states that jury instructions on penalties for lesser included offenses need not be given?

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CASE NO. 81-2230

IN THE

SUPREME COURT OF THE UNITED STATES

1981 TERM

LINDA L. McGOUGH, Petitioner,

v.

STATE OF FLORIDA, Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CITATION TO OPINIONS BELOW

The State accepts Petitioner's statement pursuant to Rule 34, F.R.A.P.

JURISDICTION

The State accepts Petitioner's statement while maintaining that Petitioner is not entitled to certiorari, for failure to comply with the requirement of Rule 17, F.R.A.P.

STATEMENT OF THE CASE

In her original appellate brief, filed in the Fifth District Court of Appeal of Florida, and again in the Supreme Court of Florida, McGough omitted certain relevant facts which were dispositive of her case when revealed.

McGough, once again, has omitted these relevant facts.

McGough's "Statement of the Case" (p.2) implies that the Assistant Attorney, at trial, made a bald statement of his personal belief in the credibility of certain State witnesses, based upon his independent conversations with these witnesses.

The real facts are as follows:

Linda McGough was tried on a charge of Murder in the First Degree.

During the trial, the prosecutor called Judy Willits to the stand, who testified:

> And when I went down to your office, I lied. And then you threatened me with perjury charges and told me I could get up to five years in prison. And I decided I wasn't going to go to jail for anyone. (Tr. 222, Resp. App. 1)

Three other times, during the trial, Willits came back to this conversation while being questioned.

In closing argument, the prosecutor told the jury:

> She came into my office and, for about an hour, told me that, I advised her of perjury. (TR 11, Resp. App. 2).

A second State witness, Mr. William McCraney, also testified that he had been threatened with perjury (TR 128-129, Resp.

App. 3-4) and, again, this fact was mentioned during closing argument. (TR 12).

While the Petitioner's objection during closing was sustained, the court sustained on the basis of form, not substance, due to the prosecutor's unfortunate use of the "first person" (i.e. "I told them").

The colloquoy was as follows: (TR 12)

> MR. BAND: Well, I took his, I took the statements and the jury is aware I took the statements.
>
> THE COURT: I understand, but you are testifying about what you did. You are testifying about what your practice is about prosecuting for perjury.

Mistrial was denied by the court, which exercised its legitimate option to instruct the jury that arguments of counsel

are not evidence. (TR 37)

Defense counsel requested separate jury instructions on the possible sentences which could be imposed for every possible lesser included offense. (TR 3) The request was denied.

As noted in Petitioner's brief, her case was subject to review pursuant to Tascano v. State of Florida, 393 So.2d 540 (Fla. 1980). Tascano's holding is, again, misstated by Petitioner (as called to the Petitioner's attention twice before) and actualy provides that defendants are entitled to jury instructions on the maximum and minimum sentences only for the crime for which they are actually on trial.

McGough's continuing misstatements of fact, now repeated for the third time, are, hopefully, inadvertent.

No issues of federal or constitutional law were briefed by McGough in State court, and no basis for Rule 17 review exists.

STATUTES AND RULES INVOLVED

Florida Rule of Criminal Procedure 3.390(a)

> The presiding judge shall charge the jury only upon the law of the case at conclusion of argument of counsel and at the request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.

FEDERAL RULE OF APPELLATE PROCEDURE RULE 17 (b) and (c)

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the

Court's discretion, indicate the character or reasons that will be considered.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

REASONS FOR DENYING THE WRIT

As quoted above, F.R.A.P. 17 provides for certiorari review of certain classes of cases, all of which involve state court (or lower federal court) interpretations of federal law and federal, constitutional claims.

The Petitioner, Linda McGough, has never submitted a brief to any Florida court raising either a 5th or 14th Amendment claim. Thus, Florida's courts have no opportunity to address these de novo issues.

The Petitioner has failed to recite any authority for the proposition that, despite the established federal doctrines of exhaustion and comity, she should now be granted certiorari review on the basis of issues not raised in Florida's courts.

Nevertheless, and without conceding standing, the Respondent submits.

I.

Florida's appellate courts do not write a specific opinion explaining every argument they choose to reject. This is

particularly true when an argument, such as McGough's argument concerning the prosecutor's conduct, comes before the appellate court on an incorrect statement of the facts.

McGough, for the third time, has drafted a statement of facts which implies that the prosecutor revealed, during closing arguments, facts that were not in evidence regarding threats of perjury and undisclosed, out-of-court interviews with the witnesses. McGough, for the third time, has failed to include in her statement the fact that the prosecutor's comments were fully supported by the trial testimony of the witnesses.

This Honorable Court's decision in Berger v. United States, 295 U.S. 668, 55 S.Ct. 629 does not involve fair comment, by

a prosecutor, on the actual testimony of the witnesses at trial. Nor does it compel the reversal of valid convictions simply because the prosecutor used improper syntax, tense or grammer while arguing to the jury.

In Thomas v. State of Florida, 325 So.2d 413, 415 (Fla. 1975) the Supreme Court of Florida observed:

> Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement the criminal laws. Their discussion of the evidence, so long as it remains within the limits of the record, is not to be condemned . . .

The Supreme Court of Florida the, relying upon its decision in Paramore v. State of Florida, 224 So.2d 855 (Fla. 1969) refused to "presume prejudice" as a result

of "impassioned eloquence", and stated that it would not overturn a trial judge's decision absent a clear abuse of discretion by that judge.

Petitioner McGough's case may be said to contrast with United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972), wherein a prosecutor simply argued that, for unexplained reasons, he "knew" the witnesses had told the truth.

This is how McGough, by editing out uncomfortable facts, would have this Honorable Court view the case at bar. At page 6 of her petition, McGough states:

> The ultimate effect of the prosecutor's arguments in this case were to leave no doubt in the minds of the jury that his investigations established that he had knowledge that had not [been] received in evidence that would corroborate the witnesses' story. [I]n fact, the prosecutor advised the jury that he

> had taken personal steps to verify the witnesses' statements, that he had done so, and that therefore there were matters outside the records which assured him that his witnesses had told the truth. (typographical errors bracketed)

The decisions of the Fifth District Court of Appeals and the Supreme Court of Florida are supported by the true facts, and should not be overturned on the basis of incorrect factual representations.

It further goes without saying that the Florida Supreme Court has exclusive jurisdiction to regulate practice and procedure in Florida's courts, and that absent a demonstrable violation of federal constitutional rights, certiorari should be denied.

II.

The Petitioner has claimed that certain imagined "rights" she thinks she holds, under Tascana v. State of Florida, 393 So.2d 540 (Fla. 1980), were deliberately withheld held from her.

Petitioner argues at page (7) that:

> The Supreme Court of Florida ruled that all accused in Florida henceforth were mandatorily entitled to an instruction on the maximum and minimum offenses for which they were charged.

Tascana, supra says nothing of the kind. Rather, it says that defendants are mandatorily entitled to an instruction on the maximum and minimum sentences (not "offenses") for the charge for which they are actually on trial, as provided for in Fla.R.Crim.P. 3.390(a).

The Petitioner also neglected to mention that every Florida district court of appeal which has confronted this question has ruled in a manner identical to McGough's court. See James v. State, 393 So.2d 1138 (Fla. 3d DCA 1981); Settle v. State, 288 So.2d 511 (Fla. 2d DCA 1974); Lewis v. State, 399 So.2d 473 (Fla. 4th DCA 1981) and Renaud v. State, 408 So.2d 1061 (Fla. 4th DCA 1981).

None of these cases were reversed by Florida's Supreme Court, providing us with strong indicia of correctness.

It must be remembered that McGough went into trial charged with murder in the first degree. McGough was convicted of murder in the second degree.

It must also be remembered that, despite being advised of the possible

sentences (including probation) for the crime charged, Florida juries are also specifically instructed to disregard the consequences of their verdicts (this admonition is contained in Florida Standard Jury Instruction 2.15).

Thus, at worst, the jurors failed to obtain information which they were legally bound to disregard anyway.

McGough has failed to demonstrate legal entitlement to the requested instructions, a denial of due process, or prejudice, and is not entitled to certiorari. Finally, absent some showing that McGough has suffered a unique construction of Florida procedural law, unlike that given other defendants, no claim that "equal protection" has been denied is tenable, or subject to review.

CONCLUSION

Due to the fact that this petition is founded upon gross and substantial misstatements of fact and law, and due to the absence of any error by the Florida courts, constitutional or otherwise, certiorari review should be denied.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to the United States Supreme Court and to Albert J. Ahern, Jr., One Skyline Place, Bailey's Crossroads, Virginia 22041; Josiah Lyman, 2025 Eye Street, N.W., Washington, D.C. 20006; and Warren H. Edwards, Suite 101, 65 N. Orange, Avenue, Orlando, Florida 32801, this day of July, 1982.

_____

Q. Okay. Was your sister?

A. Yes.

Q. After this happened, that is, the incident that night, you made several statements to the police and I also believe to Mr. Kirkland. Will you tell the jury what those statements were?

A. I told the police and Mr. Kirkland that I saw the deceased have a knife in his hand and that he tried to stab David. And I told them that Linda and David did not go back into the office, that they were out there, and I saw them the whole time everything was happening. And when I went down to your office, I lied. And then you theatened me with perjury charges and told me tha I could get up to five years in prison. And then I decided I wasn't going to go to jail for anyone.

Q. And is that when you came forward with what you believe to be the truth?

A. Yes.

Q. And that's what you have just told this jury?

A. Yes.

Q. There came a time when you left Orlando. Is that correct?

A. Yes.

Q. How did you come to leave Orlando?

A. I was in the dressing room and I was putting make-up . . .

REDIRECT EXAMINATION

BY MR. BAND:

Q. Mr. McCraney, do you recall the time I invited you, didn't I invite you, but had a subpoena issued for you to come to my office?

A. Okay. Yes.

Q. Okay. That was after Judy Willits had been subpoenaed. Is that correct?

A. I don't remember the order, Mr. Band. Yes, it was. Okay. Because I just remembered.

Q. Okay. After Miss Willits had been subpoenaed to my office, did you have a conversation with her as to what took place?

A. Yes.

Q. When you came into my office, isn't it true that I advised you that I had known

from Miss Willits what she said?

MR. KIRKLAND: Your Honor, I would object to that. That's leading. He is going through what he said and that's strictly leading, because it suggests an answer.

MR. BAND: I think it is leading, Your Honor.

THE COURT: I sustain the objection.

REDIRECT EXAMINATION (CONTINUED)

BY MR. BAND:

Q. You were aware, then, were you not, that Miss Willits and I had a conversation as to what transpired that night?

A. Yes.

Q. Okay. Isn't it true that I advised you that, if you did not tell the truth, I would seek perjury action against you?

A. Correct.

Q. Did I every threaten you?

A. No.

Q. I just asked you to tell the truth?

A. I won't say threatened. You advised.

MR. BAND: I have no further questions, Your Honor.

RECROSS-EXAMINATION

BY MR. KIRKLAND:

Q. Advised you had a choice to change your story or go to the penitentiary?

A. No, sir, advised me that I had a choice of either telling the truth or going.

MR. KIRKLAND: I have no further questions on that part, Your Honor. I do reserve the right to cross-examine him on the tape, which is being typed up overnight.

THE COURT: That's the only matter that's left as far as this witness is concerned?

MR. KIRKLAND: Yes, sir.

THE COURT: All right. That's all, Mr. McCraney.